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IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

IN THE MATTER OF THE PETITION OF THE EQUITABLE TRUST COMPANY OF NEW YORK, AS TRUSTEE, FOR A WRIT OF MANDAMUS, TO BE ISSUED AND DIRECTED TO THE HONORABLE WILLIAM C. VAN FLEET, JUDGE OF THE UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT OF CALIFORNIA, SECOND DIVISION.

ARGUMENT FOR PETITIONER.

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Filed this.....day of May, 1916.

....., Clerk.

By.....Deputy Clerk.

THE JAMES H. BARRY CO.

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STATEMENT OF THE CASE.

This argument is submitted upon the return to an order, made by this Court under date April 17, 1916, upon the petition of The Equitable Trust Company of New York, as Trustee, directing Honorable William C. Van Fleet, Judge of the District Court of the United States for the Northern District of California, to show cause, if any there be, why the said petition should not be granted and why the writ of mandamus, as therein prayed, should not be issued, commanding him to cause an authenticated copy of an affidavit of personal bias and prejudice theretofore filed in an action then pending before him and to be tried and heard before him to be certified forthwith

to the senior circuit judge then in the circuit for such proceedings as are provided by law.

Section 21 of the Judicial Code provides:

> "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

Section 20 of the Judicial Code, the section last preceding Section 21, provides:

> "Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so re-

lated to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section fourteen."

Section 14 of the Judicial Code provides:

"When, from the accumulation or urgency of business in any district court, the public interests require the designation and appointment hereinafter provided, and the fact is made to appear, by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit in which the district lies, such circuit judge or justice may designate and appoint the judge of any other district in the same circuit to have and exercise within the district first named the same powers that are vested in the judge thereof. Each of the said district judges may, in case of such appointment, hold separately at the same time a district court in such district, and discharge all the judicial duties of the district judge therein."

The petition pursuant to which the order to show cause was issued shows the following facts:

On the 29th day of March, 1916, there was pending in the District Court of the United States for the Northern District of California before Honorable William C. Van Fleet, one of the judges of said Court, a suit brought by this petitioner, The Equitable

Trust Company of New York, as Trustee, as plaintiff, against Western Pacific Railway Company and others, as defendants, for the foreclosure of the First Mortgage of Western Pacific Railway Company and for the appointment of receivers for the property covered by such First Mortgage *pendente lite*, in which action John S. Drum and Warren Olney, Jr., had been appointed and were acting as such receivers and John S. Partridge had been appointed and was acting as counsel for such receivers.

Upon said 29th day of March, 1916, there was also pending in said Court, and in said cause, a petition of Savings Union Bank and Trust Company, for leave to intervene in said cause.

Upon the 3rd day of April, 1916, there was filed in said cause by The Equitable Trust Company of New York, the plaintiff therein, an affidavit of Lyman Rhoades, one of the vice-presidents of said Trust Company, therein stated to have been made for and on behalf of such Trust Company, as such plaintiff, and pursuant to a resolution of its Executive Committee passed upon consideration of a report made to it by said Rhoades of the facts set forth in such affidavit, requesting and directing that such affidavit be made by said Rhoades and filed in said cause.

Such affidavit set forth that said Honorable William C. Van Fleet, the judge before whom such action of The Equitable Trust Company of New York, as Trustee, against Western Pacific Railway Company

and others was pending and was to be heard, had a personal bias and prejudice against The Equitable Trust Company of New York, the plaintiff in said cause, a personal bias and prejudice against said The Equitable Trust Company of New York, as Trustee, and as plaintiff in said cause, a personal bias and prejudice in favor of Frank G. Drum and Warren Olney, Jr., as Receivers of Western Pacific Railway Company, appointed in said cause, and John S. Partridge, their counsel, who had by their actions, recited in such affidavit, and under the authority, or with the acquiescence, of said judge, become parties to various controversies which had arisen in said cause, and to which said Trust Company was also a party, and a personal bias and prejudice in favor of Savings Union Bank and Trust Company which had sought to intervene in said cause.

Such affidavit also stated at considerable length the facts and the reasons for the belief that such bias and prejudice existed, and, not having been filed not less than ten days before the beginning of the term of the Court, which began on the 6th day of March, 1916, showed good cause for the failure to file it within that time.

At the foot of such affidavit said Lyman Rhoades as the authorized officer of and in behalf of said The Equitable Trust Company of New York, the plaintiff in such action, prayed that said judge, Honorable William C. Van Fleet, should proceed no further in

said cause, or in any matter arising therein, and that another judge should be designated therefor, in the manner by law prescribed, and that said Honorable William C. Van Fleet should cause the fact of the filing of such affidavit and application to be entered on the records of the court and also an order that an authenticated copy thereof should be forthwith certified to the senior circuit judge for this Ninth Circuit then present in the circuit, for such further proceedings as are prescribed by law.

The affidavit and application were accompanied by a certificate of Jared How, counsel of record in said action for The Equitable Trust Company of New York, as Trustee, that such affidavit and application were made in good faith. A copy of such affidavit and application and of the certificate of counsel accompanying the same are attached to the petition in this proceeding (Record, page 19).

At the time of filing such affidavit, that is to say, at forty minutes past nine o'clock in the forenoon of said 3rd day of April, 1916, counsel in said action for The Equitable Trust Company of New York presented to the Clerk of the District Court of the United States for the Northern District of California, in whose office such affidavit was so filed, a form for an order, entitled in said cause, and in the usual form, directing that the fact of the filing of such affidavit should be entered on the records of the court, and that an authenticated copy thereof should be forthwith certified

to the senior circuit judge for this circuit then present in the circuit, and requested said clerk to take forthwith such affidavit and such form for an order to said judge, Honorable William C. Van Fleet, in chambers. A copy of such form for an order is attached to the petition herein (Record, page 64).

Said judge, upon the presentation of such affidavit to him by said clerk, refused to receive or consider the same, and directed said clerk to state to counsel for the Trust Company that proceedings in the matter of such affidavit and application must be taken in open court.

In accordance with such requirement of said judge in that regard, counsel for the Trust Company, at the opening of said court at ten o'clock in the forenoon of said 3rd day of April, 1916, suggested to said judge, Honorable William C. Van Fleet, that said affidavit had been filed in said action of The Equitable Trust Company of New York, as Trustee, against Western Pacific Railway Company and others, and that, pursuant to the provisions of Section 21 of the Judicial Code, said judge could take no further proceedings in said action, and submitted to him said form for an order required by the provisions of the Judicial Code to be made in the premises.

The judge then requested counsel for said Trust Company to read such affidavit; and said counsel, although protesting that the practice prescribed by the Judicial Code did not require that such affidavit should be read by him in open court, consented to

read and did read the affidavit in full, together with the certificate of counsel accompanying it; and, upon the completion of such reading, again suggested to the judge the procedure prescribed by the Judicial Code and again submitted to him such form for an order in conformity with the provisions thereof. Thereupon the judge caused the further consideration of the matter to be continued to and until ten o'clock in the forenoon of the 5th day of April, 1916.

Upon the opening of court on said 5th day of April, 1916, said judge declared that if he should determine either upon his own judgment or upon the advice of counsel with which his judgment might concur that said affidavit "is of legal sufficiency to give rise to prejudice such as the statute contemplates," then he should proceed to certify the fact to the senior circuit judge; but if, on the other hand, he should determine that it is not legally sufficient, then it would be his duty to ignore the affidavit and refuse to enter any such record as would be required if he were called upon by reason of the character of the affidavit to certify it to the circuit judge.

The judge at that time further declared that he was entitled to the advice of counsel and therefore had requested Garret W. McEnerney, Esq., and John S. Partridge, Esq., representing him personally, to give him their judgment; and that a request made by them for further time was reasonable, and that he should grant it. And thereupon, over the objection of counsel

for the Trust Company, and notwithstanding his protest that the plain and right meaning of Section 21 of the Judicial Code is that said judge was then, because of the filing of said affidavit, foreclosed from further proceeding with the cause, and that further proceeding means, not only such proceeding as is pertinent to the relief prayed in the bill of complaint, but, as well, proceeding in the matter of said affidavit and application, because said application was made in the cause and is a proceeding in the cause, the judge ordered that the matter of the consideration of such affidavit and application should stand over to and until two o'clock in the afternoon of the 7th day of April, 1916.

A transcript of the proceedings before said judge in the matter of said affidavit and application upon the 3rd day of April, 1916, is annexed to the petition herein (Record, page 65); and a transcript of such proceedings on the 5th day of April, 1916, is likewise attached to such petition (Record, page 127).

Upon the calling of the matter of said affidavit and application for further consideration at two o'clock in the afternoon of said 7th day of April, 1916, said judge, over the objection of counsel for the Trust Company thereto, caused to be read his verified answer to said affidavit, which answer had theretofore been filed in the cause. Such answer denied the existence of any bias or prejudice of said judge either against The Equitable Trust Company of New York, the plaintiff in said action, then pend-

ing before him, or against said The Equitable Trust Company of New York, as Trustee and as plaintiff in said cause, or any bias or prejudice in favor of either Frank G. Drum or Warren Olney, Jr., as Receivers of the Western Pacific Railway Company, appointed by him, or in favor of their counsel John S. Partridge, or in favor of Savings Union Bank and Trust Company, the petition of which to be allowed to intervene in said cause was then and is still pending therein. It also denied various of the statements contained in such affidavit and especially such as were of conclusions drawn by the affiant from matters which were set forth at length in the affidavit.

In such answering affidavit of said Honorable William C. Van Fleet, so filed and caused to be read in open court by said judge, it was declared:

> "That it is the intent of the affiant to proceed forthwith, and with all possible expedition, to the hearing of any further matters that may be involved in said cause, looking to the speedy entry of a decree of foreclosure and sale, and winding up of the receivership;
>
> "That affiant is satisfied in the state of his own mind that affiant, in all matters and things in connection with said action, can and will, and intends to, do equal and exact justice to all parties who may be interested therein."

Thereafter, said judge, likewise over the objection of said counsel for The Equitable Trust Company of New York, and upon further hearing of said matter, allowed to be filed and read in said proceeding

an affidavit of John S. Partridge, a copy of which is annexed to the petition herein (Record, page 161); and permitted the counsel appointed by him, and theretofore stated by him to be representing him personally, to introduce in said proceeding a considerable amount of evidence and to make extended arguments, not only upon the merits of the Rhoades affidavit, but, as well, upon the propriety, from the viewpoint of honesty, of the manner of the performance by the Trust Company of its duties as trustee and as plaintiff in the main action, an example of which is set forth in the petition (Record, page 10).

At the conclusion of such hearing said judge gave orally his opinion and decision in which he refused to cause an authenticated copy of such affidavit to be certified to the senior circuit judge then present in the circuit. Such opinion and decision are set forth in full in an amendment to the petition herein.

The petition herein shows further that said judge, Honorable William C. Van Fleet, intends to and will, in said action of The Equitable Trust Company of New York, as Trustee, against Western Pacific Railway Company and others, fix and determine the up-set price for which the mortgaged property may be sold under foreclosure; and pass upon and determine the question of the right of Savings Union Bank and Trust Company to intervene therein; and pass upon and determine the compensation to be paid to John S. Partridge, counsel for the Receivers and for said judge personally.

The petition further shows that a Plan and Agreement has been framed for the carrying out of which holders of approximately $43,900,000 par value of First Mortgage bonds of the Western Pacific Railway Company have joined and holders of approximately $2,500,000 of such bonds have agreed to co-operate; that such Plan and Agreement contemplates the purchase at foreclosure sale of all the mortgaged properties, in the interest of all such holders of such First Mortgage bonds as shall be willing to participate therein, and the issue by the purchaser forthwith of $20,000,000 par value of bonds to be secured by a first lien upon the properties so purchased; that, in order that the Plan and Agreement might be carried out, it was essential that a fair market for such bonds, when issued, should be assured; that to that end an underwriting syndicate has been formed and has agreed to ensure the sale of such bonds at a price and upon terms which are believed to be more favorable than can again be secured; that, by the terms of such underwriting agreement, the syndicate is entitled to call for such bonds on or before July 1, 1916; that if, through delay in the entry and enforcement of a decree of foreclosure and sale in said action, it shall become impossible to carry out such Plan and Agreement before said July 1, 1916, such holders of bonds as shall have joined therein will suffer great and irreparable loss; that your petitioner, as Trustee for such bondholders, is without remedy by appeal,

or otherwise than by a writ of mandate out of this court as prayed.

ARGUMENT.

The argument will be made under the following captions:

I.

As to the meaning of Section 21 of the Judiciary Code.

II.

As to whether the provisions of Section 21 of the Judiciary Code are violative of the Constitution of the United States.

III.

As to the sufficiency of the Rhoades affidavit.

IV.

As to whether the affidavit shows good cause for not filing it within the time limited by Section 21 of the Judiciary Code.

V.

As to whether Mandamus will lie.

I.

AS TO THE MEANING OF SECTION 21 OF THE JUDICIAL CODE.

a.

In Section 21 of the Judicial Code the Congress has said that

> "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated . . . to hear such matter. . . . Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists . . . and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith."

The rule of first importance in construing statutes is that

> "the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. . . . No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."
>
> Mr. Justice Brewer in *United States* vs. *Goldberg,* 168 U. S., at page 102.

Upon the application of this rule, the meaning of this provision of the Judicial Code is established. The language employed by the Congress is clear, direct and entirely unequivocal. It does not say that the actual existence of the bias or prejudice complained of must be shown beyond a reasonable doubt nor even by a preponderance of probability. The prevailing idea of the Congress in enacting the provision was manifestly that in order to be entitled to a change of judge the party applying for it shall merely have reached a conviction that a personal bias or prejudice exists in the mind of the then presiding judge either against him or in favor of an opponent in the case; and that he shall have reached that conviction in good faith; and the reason for the requirement that the affidavit shall state the facts and reasons *for the belief* that such bias or prejudice exists is obviously not that a trial of the facts may be had, but only that the affidavit may itself disclose whether it is made in good faith.

There are many who think that the fact that justice will be rendered through the administration of our laws is not all that those who are subject to them are entitled to; and that a feeling of assurance that justice will be administered is essential to the preservation of the dignity and to the stability of our institutions. Apprehension of a failure of justice at the hands of judges is in slight degree, if any, less harmful than the failure of justice itself; and in many

cases it may well be much more harmful. It is apparent that this provision of the Code was framed with full appreciation of that fact and was not designed solely to prevent unjust and unfair decisions but, as well, to afford relief from apprehension that unjust and unfair decisions would be rendered. Whatever the design of the Congress, however, that is the effect of the provision, if enforced according to the clear meaning of the language employed in framing it. No casuist, however skillful, can render that meaning obscure. In *Henry* vs. *Speer,* 201 Fed., 869, the Circuit Court of Appeals for the Fifth Circuit has said:

> "Section 21 has to do with the personality of the judge before whom the suit is to be tried and rights established. It is remedial in its nature; that is, it is meant to afford relief from adventitious predicaments which fair-minded men recognize should be relieved against, when they in fact exist. In affording this relief the Congress has expressed itself plainly and perspicuously. It is not difficult to arrive at its true intent and meaning."

There is, therefore, no need to resort to any extraneous matter for the construction of this provision; but if there were, there is extraneous matter which would be helpful.

b.

The provision of Section 21 of the Judicial Code made its first appearance in federal legislation upon

the adoption of the Code in the year 1911. But prior to that time it had appeared in the legislation of several States and had been construed and applied many times and with almost complete consistency.

The provision appeared in Illinois in the Act of 1845 relating to venue; and was construed in the same year, in *McGoon* vs. *Little,* 7 Ill., 42, to mean that, upon the filing of the affidavit of prejudice, the judge before whom the case was pending had no discretion whatsoever to refuse the change of venue.

It appeared in Indiana in the Rev. Stat. of 1852 and was construed in the same way, as it applied to civil cases (2 R. S. 1852, p. 74) in *Witter* vs. *Taylor,* 7 Ind., 110 in 1855, and as it applied to criminal cases (2 R. S. 1852, pp. 370-1) in *Goldsby* vs. *State,* 18 Ind., 147, in 1862. In that case it appeared that the statute provided for a change of venue in criminal cases for two causes: prejudice of the judge and excitement or prejudice against the defendant in the county; and it provided that

> "When the objection is to the judge in an action pending in the Court of Common Pleas, the action may be transferred to the Circuit Court of the county and tried therein";

and

> "When the affidavit is founded upon excitement or prejudice in the county against the defendant, the Court may in its discretion grant a change of venue to the most convenient county."

In its opinion the Court said:

> "When a change is asked on account of excitement or prejudice against the defendant in the county, it is clear that it may or may not be granted, because the matter is left to the discretion of the Court. Not so, however, when the change is asked because of the prejudice of the judge against the accused. In such case, the statute does not provide for the exercise of any discretion by the judge, and perhaps it is well it does not."

And to the same effect see *State* vs. *Palmer,* 57 N. W. Rep., 490 (South Dakota, 1894).

We might digress here to call attention to the difference between the procedure provided in Section 20 and that provided in Section 21 of the Judicial Code. Section 20 provides that "Whenever it appears that "the judge of any district court is in any way con- "cerned in interest in any suit pending therein or "has been of counsel or is a material witness for "either party, or is so related to or connected with "either party as to render it improper, *in his opinion,* "for him to sit on the trial, it shall be his duty, on "application of either party," to cause the matter to be certified to the senior circuit judge to the end that another judge may be designated to hear the matter. It seems to be clear that the fact that Section 20 expressly provides that the setting the procedure in motion is to depend upon the decision of the judge and that Section 21 does not so provide is significant that in Section 21 it was not intended so to provide,

and that the procedure under that section was intended to be set in motion by a purely ministerial act as distinguished from a judicial act of the judge.

The provision in question appeared in the legislation of Wisconsin in 1853 and was construed in the same year (*Baldwin* vs. *Marygold,* 2 Wis., 419) in the same manner as it had been construed in Illinois; and similar legislation and like construction by the courts was had in Iowa (*Jones* vs. *Railway Co.,* 36 Iowa, 68, decided in 1872), in North Dakota (*State* vs. *Kent,* 62 N. W. Rep., 631, decided in 1895), in South Dakota (*State* vs. *Palmer,* 57 N. W. Rep., 490, decided in 1894), in Minnesota (*State* vs. *Hoist,* 126 N. W. Rep., 1090, decided in 1910), and Oklahoma (*Lincoln* vs. *Oklahoma,* 58 Pac. Rep., 730, decided in 1899). The Circuit Court of Appeals for the Eighth Circuit has also, in *Cox* vs. *United States,* 100 Fed., 293, decided in 1900, construed the Oklahoma statute, and has approved the construction given by the Territorial Court in *Lincoln* vs. *Oklahoma.*

The rule that statutes adopted by one State after they have been construed in another State are presumed to have been adopted with the construction which had been placed upon them has been applied by the Supreme Court of the United States in the case of statutes adopted by the Congress for territories of the United States (*Robinson* vs. *Belt,* 187 U. S., 41), and for the District of Columbia (*Capital Traction Co.* vs. *Hof,* 174 U. S., at page 36); and, by a parity

of reasoning with that of the Court in its opinions in those cases, the Congress must be presumed to have adopted Section 21 of the Judicial Code with the construction placed upon similar statutes by the Courts of States which had theretofore enacted them.

In this particular case the presumption is much strengthened, if not rendered conclusive, by the proceedings of the House upon the adoption of Section 21 (Cong. Rec., Vol. 46, Part I, Dec. 14, 1910, pp. 305-6; and Part 3, Feb. 15, 1911, pp. 2626-2630). This section was moved in the House as an amendment to the Code as it was reported out of the committee and recommended. It was moved by a member from Indiana; and in the discussion preceding the adoption of the amendment, the member from Indiana cited the Indiana statute of similar character and the practice under it in support of his motion for the adoption of the amendment. The Indiana practice has from the beginning been in exact conformity with the earliest decisions of its courts as stated above.

Witter vs. *Taylor, supra* (1855);
Goldsby vs. *State, supra* (1862); . .
Manly vs. *State,* 52 Ind., 215 (1875);
Duggins vs. *State,* 66 Ind., 350 (1879);
Krutz vs. *Griffith,* 68 Ind., 444 (1879);
Krutz vs. *Howard,* 70 Ind., 174 (1880).

C.

It being clear then that the section under consideration means that the judge against whom the affidavit is filed has no power to determine whether the affidavit tends to show bias or prejudice—that is, tends to show it to such extent that it may not be reasonable to consider the claim of the affiant, that he believes that such bias or prejudice exists as asserted, to be spurious —it remains to consider what power, if any, such judge has to determine whether, if the affidavit was not filed not less than ten days before the beginning of the term of the court (and this affidavit was not so filed), good cause is shown in the affidavit for failure to file it within such time.

There is no apparent reason why the determination of the sufficiency of the affidavit and the determination of the sufficiency of the cause for not filing it not less than ten days before the beginning of the term should stand on different bases. If the judge shall proceed to determine either matter, he is violating the prohibition against proceeding further in the suit; because the affidavit is filed and the application is made in the suit, and obviously, if the judge shall determine judicially either that the affidavit is insufficient in substance or that the cause attempted to be shown for not filing it within the time limited is insufficient, he will be proceeding further in the suit.

Moreover, the views which have been expressed in

the opinions of courts against the propriety of permitting the judge to sit in judgment upon a matter in which he is so vitally interested will apply to the determination of the sufficiency of the affidavit upon the merits with equal force as to the determination whether good cause has been shown for not filing the affidavit within the time limited. An example of an opinion of this character is that of the Supreme Court of North Dakota in *State* vs. *Kent,* 62 N. W., 631, in which it is said:

> "The mind that cannot decide that it is biased without at the same time admitting by such decision that it was willing in that condition to enter on the trial of the man against whom the prejudice is entertained, without disclosing such prejudice and bias, and that it would have carried on such trial to its close, conscious that it was not impartial —a man placed in a position where a decision against his own freedom from bias will bring such humiliation—is not that calm, disinterested mind with respect to that question which the law requires and the honest administration of justice demands. This consideration renders it impossible for us to impute to the legislature the purpose to permit the judge so assailed to pass on his own bias."

The same argument would apply as well against the propriety of permitting the judge to sit in judgment upon a question, the determination of which by him might result in entirely eliminating the charge of prejudice from the record.

It may be contended that if the affidavit shall not

be filed within the time limited or good cause shown why it is not so filed, it will not have been entitled to be filed at all, and that in that event the district judge will not be called upon to proceed as provided by the statute; and that the determination of the question whether the affidavit was entitled to be filed must therefore rest in him. If that be true, his determination must be considered as judicial in character.

But that view of the matter is inconsistent with the opinion of the Supreme Court in the case of *ex parte American Steel Barrel Company*, 230 U. S., 35. In that case, District Judge Chatfield had caused to be certified an affidavit of prejudice to Circuit Judge Lacombe. The Supreme Court said "Judge Lacombe was clearly "called upon to determine in the exercise of his juris- "diction as the senior circuit judge whether the situa- "tion was one in which he should designate a judge "in the room and place of Judge Chatfield. He de- "termined the matter adversely to the petitioner. If "in this he made a mistake, it was one made in the "course of his legitimate jurisdiction under Section 14 "of the New Judicial Code, and we cannot compel "him through a writ of mandamus to undo what has "thus been done."

It is obvious that the jurisdiction of the senior circuit judge in this proceeding is original and not appellate. It is obvious also that jurisdiction to determine the question whether good cause has been shown for not filing the affidavit within the time limited cannot

exist equally in the district judge and the circuit judge. If, therefore, the circuit judge possesses the power, it cannot also exist in the district judge. In other words, the holding of the Supreme Court that the circuit judge has the power to determine the question necessarily forbids a contention that the district judge has such power.

II.

AS TO WHETHER THE PROVISIONS OF SECTION 21 OF THE JUDICIAL CODE ARE VIOLATIVE OF THE CONSTITUTION.

If this question is serious it has become so because of the opinion of District Judge Jones in the case of *Ex parte Fairbank Co.*, 194 Fed., 978. The opinion was given on the 12th of March, 1912. Since then the provisions of Section 21 have been construed by the Circuit Court of Appeals in the circuit within which Judge Jones resides in the case of *Henry* vs. *Speer,* 201 Fed., 869 (Jan. 7, 1913), and by the Supreme Court in the case of *Ex parte American Steel Barrel Co.,* 230 U. S., 35 (June 16, 1913). The question of the constitutionality of Section 21 was not mentioned in the opinion in either of these cases, although examination of the briefs of counsel in the Steel Barrel Company case discloses that it was thoroughly argued by both sides.

But the argument that the provisions of Section 21

are in violation of the Constitution is easily disposed of. The opinion of Judge Jones declares:

a. The power to decide upon the facts in a given case that a judge is disqualified to sit in it is judicial.

b. Such power is one of the inherent powers of courts.

c. The real effect of Section 21 is to arm a litigant with this judicial power.

d. The Constitution and laws require the judge to sit in every case in his court unless he is excluded for causes which disqualify him, the existence of which must be declared by some judicial tribunal.

The argument in support of these propositions shows clearly that the disqualification in the mind of the judge is common law disqualification; and the practice which he declares to be essential is that created by the courts where there have been no statutory provisions or where the statutory provisions contemplated judicial determination of the fact of the existence of prejudice. But as was said by the Circuit Court of Appeals for the Eighth Circuit in *In re Nevitt,* 117 Fed., 448, disqualification may be constituted by "Interest in the subject-matter of the litigation, relationship to one or more of the parties to it, *and statutory prohibitions.*" The disqualification in question in this proceeding is not a common law disqualification. It rests upon the statutory provision

prohibiting the judge from proceeding any further in an action pending before him after the affidavit described in the statute has been filed.

> "With the exception of the Supreme Court, the authority of Congress in creating courts and conferring on them all or much or little of the judicial power of the United States is unlimited by the Constitution" (*United States* vs. *Union Pac. Co.*, 98 U. S., at page 603).

And it does not admit of doubt "that the power to "ordain and establish carries with it the power to "prescribe and regulate the modes of proceeding in "such courts" (*Livingston* vs. *Story*, 9 Peters, at page 656). Congress has power to "parcel out the jurisdiction among such courts from time to time at their own pleasure" (*Martin* vs. *Hunter's Lessee*, 1 Wheat., at page 331). It also, of course, has power to provide for as many or as few judges as it may see fit and to divide the business of the courts among them as it thinks proper.

The Act of March 2, 1907, provided for the appointment of an additional judge for the Northern District of California and that the senior circuit judge or any circuit judge within the State of California shall make the necessary orders for the division of business and the assignment of cases for trial (34 Stat., 1253). It is apparent that in so dividing the business and assigning cases for trial the circuit judge is not performing a judicial function but only one purely ministerial.

The fact that the act is done by a judicial officer does not make it judicial in character. *Ex parte Virginia,* 100 U. S., at page 348; *People* vs. *Bush,* 40 Cal., 344. It follows, then, that Congress might have provided rules for the guidance of the circuit judge in the division of business or the assignment of cases without laying its action open to the objection that the legislative department of the government was trespassing upon the province of the judicial department. But that is all that has been done by Section 21 of the Code. It merely provides that whenever an affidavit of the character described shall have been filed in the case the senior circuit judge then in the circuit shall assign the case for trial before some other judge than that before whom the case is then pending. See *State* vs. *Clancy,* 77 Pac., at p. 317 (Mont.).

We submit that it has been established that the sole power to determine whether the affidavit is sufficient in substance and whether it has been filed in time is for the senior circuit judge after the matter has been certified to him by virtue of the provisions of the Code, and not for this Court; but nevertheless we proceed to a consideration of the questions which may be claimed to arise from the contents of the affidavit itself.

III.

AS TO THE SUFFICIENCY OF THE RHOADES AFFIDAVIT.

The statute provides that the affidavit shall be "that " the judge before whom the action or proceeding is " to be tried or heard has a personal bias or prejudice " either against him or in favor of any opposite party " to the suit"; and that it "shall state the facts and " the reasons for the belief that such bias or prejudice " exists."

The affidavit sets forth, in the exact terms of the statute, the existence of personal bias and prejudice on the part of the judge against The Equitable Trust Company of New York, the plaintiff in said cause, and against said Trust Company, as Trustee, and as plaintiff in the cause, and in favor of the receivers and their counsel who have, under direction of, or with the acquiescence of the judge, become parties to various controversies which have arisen in the cause, to which the Trust Company is also a party, and in favor of Savings Union Bank and Trust Company, the application of which to be allowed to intervene in said cause for the purpose of procuring the fixing in the decree, to be entered in said cause, the largest possible up-set price, is now pending and is opposed by the Trust Company.

It sets forth at much length also the facts and the reasons for the belief of the affiant that such personal bias and prejudice exist. It was said by the Supreme

Court in the American Steel Barrel case, *supra,* that these facts and reasons must be "facts and reasons which *tend to show* personal bias or prejudice" (230 U. S., at page 44). The facts and reasons set forth in the affidavit, and which are believed to tend to show such personal bias and prejudice, consist principally of the following:

1. Prior to the institution of said suit in his court, and from the 1st day of March, 1914, until after the 1st day of September, 1914, various members of the immediate family of said judge were severally the owners in various amounts of First Mortgage bonds of said Western Pacific Company, amounting in the aggregate to approximately $9,000.00. All of said bonds excepting bonds in the principal amount of $3,000.00 owned by a sister-in-law of said judge, who is a member of his household, had been disposed of late in the month of February, 1915, approximately one week prior to the commencement of said cause, at which time it was a matter of common knowledge that such cause was about to be commenced in the court of said judge, and in the purchase and sale of such bonds a considerable loss was sustained. Said sister-in-law of said judge is believed to be still the owner of said bonds and has not deposited the same under the Plan of Reorganization of the bondholders of said Western Pacific bonds.

2. At the time of the appointment of receivers in

the suit, the judge was requested by the parties thereto, no one dissenting, to appoint Warren Olney, Jr., as receiver; but the judge, of his own motion, in order, as he explained, to have as receiver some one with whom he was acquainted and in whom he had confidence, appointed Frank G. Drum as a receiver with Warren Olney, Jr.; and, although it was represented to him that the then existing legal department of the Western Pacific Company was adequate for the discharge of the legal duties incident to the receivership, appointed, as counsel for such receivers, John S. Partridge, who is a member of the firm of which the judge had formerly been a member. The son of said judge was, at the time of the appointment of said Partridge, and still is, in his employment and was associated in practice with him.

3. In May, 1915, The Equitable Trust Company of New York, as Trustee under the First Mortgage of the Western Pacific Company, and at the request of the holders of a majority of the bonds secured by such mortgage, filed in the District Court of the United States for the Southern District of New York its bill by which it sought to enforce the liability of the Denver & Rio Grande Railway Company under what is commonly called Contract B. to pay to the Trust Company, for the benefit of all holders of the First Mortgage Bonds of Western Pacific Railway Company, the difference between the amount due from the Western Pacific Company for interest on

its bonds and for sinking fund requirements under its First Mortgage and the amount actually paid by that Company, and to restrain the individual holders of some of such bonds, which bore an endorsement of direct guaranty of such interest payments by the Denver Company, from enforcing such direct guaranties to the impairment of the obligations of the Denver Company under Contract B. in favor of all holders of such First Mortgage bonds equally.

The Judge displayed resentment against the Trust Company for bringing this suit without his permission and Receiver Frank G. Drum and counsel for the Receivers John S. Partridge stated in substance that the action of the Trust Company in bringing this suit was an affront to the judge and to themselves.

Upon an application to the judge by the Receivers soon thereafter for instructions as to whether they should bring a suit for the enforcement of the said obligations of the Denver Company, the judge, of his own motion, issued an order to the Trust Company directing it to show cause why it should not be restrained from further proceeding in such New York suit; and subsequently rendered an opinion and of his own motion caused an order to be entered enjoining the Trust Company from taking any further proceedings in said suit and from prosecuting such obligation of the Denver Company in any court excepting his court and from taking any action with respect

to the obligations of said Denver Company without his consent.

Subsequently, upon the taking of an appeal from said order, said judge entered an order directing the Receivers to take any steps they might deem necessary to protect the jurisdiction of his court upon said appeal. At that time, counsel for the Trust Company applied to said John S. Partridge, as counsel for said Receivers, to join all other parties to said cause in a stipulation waiving the issuance of citation upon such appeal and consenting that such appeal might be heard on March 16, 1916, together with an application for a writ of prohibition and an application for a writ of mandamus hereinafter referred to; but said John S. Partridge notified counsel for the Trust Company that, after consultation with Garret W. McEnerney, Esq., special counsel for said judge and for said Receivers in the matter of said appeal and applications, he refused to do so.

4. Holders of approximately $43,900,000 principal amount out of $50,000,000 outstanding of Western Pacific First Mortgage bonds have joined in forming a Reorganization Committee and adopting a Plan and Agreement for the reorganization of the Railway Company, and the holders of approximately $3,000,000 principal amount of such bonds other than those held by persons who have joined in such Plan and Agreement are represented by a committee which has acted in co-operation with said Reorganization

Committee. All holders of such bonds have been and are at liberty to join in said Plan and Agreement. The Trustee, pursuant to a provision of such First Mortgage, and as in duty bound to do, is receiving and obeying instructions from said Reorganization Committee as representing the holders of a majority in amount of said bonds; but has not received any instructions or taken any proceedings which operate to the advantage of one set of bondholders as distinguished from another. The judge, however, apparently regards the Trust Company as in reality not acting for the bondholders who have not joined in said Plan and as acting solely for the bondholders who have joined therein.

5. On the 6th day of March, 1916, counsel for the Trust Company applied to said judge, pursuant to a stipulation of all parties to the action, including the only creditors who claimed any right of preference over, or any right to share equally with, said bondholders, for a decree of foreclosure and sale in said action. Upon the making of such application said judge stated, despite the protest of counsel for the Trust Company, that he would not pass upon it without hearing counsel for the Receivers; and said in that connection:

> "The Court is responsible for the administration of this property. Its avenue of aid and of enlightenment is not only counsel for the respective parties, but the counsel for the Receivers and the Re-

ceivers themselves. The Court does not propose to make any order in this matter without such enlightenment as will enable it to take a course which, in its judgment, is going to redound to the safeguarding and the benefit of the bondholders of this road. . . .

"I feel that, inasmuch as these Receivers represent the Court, and through their counsel are the mouthpiece of the Court, for its information and for its guidance with reference to the rights of those whose interests have been committed to the keeping of the Court, that they have a right to be heard here. I shall most assuredly give them that right."

The hearing of such application was then adjourned until two o'clock in the afternoon of said day for the purpose of hearing counsel for said Receivers who was then heard by said judge in opposition to the granting of such application.

At the same hearing the judge said further:

"Now, the Court unquestionably proposes to have such light upon the situation as will enable it to proceed in accordance with the rights of all the parties here concerned, because the Court is not here alone sitting to adjudicate rights of any particular lot of bondholders, or section of bondholders; it must protect them all, the smallest with the largest, the greatest with the least. . . .

"The Court is in this position: It is just as much bound, as I have indicated, to protect the rights of those bondholders who have seen fit to stand out and not subscribe to the reorganization scheme as those who have subscribed. . . . Now, they are before the Court; this Court is obligated to protect their rights equally with that

of any body of bondholders who may desire a different course to be pursued."

The affidavit declares that in making this statement the judge clearly implied that the Trustee was acting only in the interest of bondholders who had joined in the plan of reorganization hereinabove referred to and was not caring for all bondholders as it is in duty bound to do and as it is doing.

At the conclusion of said hearing upon said 6th day of March, 1916, said judge continued the same for one week to the end that counsel for the Receivers might present affidavits in connection with such application; and at the same time said judge, although requested so to do, refused either to direct the entry of said decree or to deny the application for the entry thereof, although the suggestion that an order denying the application might be made was made to him with the avowed purpose that such denial of said application might be reviewed upon the merits by the United States Circuit Court of Appeals in a proceeding for mandamus.

In this connection the affidavit states that said judge manifestly intended to prevent such review and the expression of such Circuit Court of Appeals concerning the right of the parties to the entry of said decree.

6. In the argument upon the return of the order directing the Trust Company to show cause why it should not be enjoined from proceeding with the suit

instituted by it in New York, counsel for the Receivers argued that the Denver & Rio Grande Railroad Company should be made a party to said suit then pending before said judge in his court; that its obligations could be determined in said suit; and that an equitable lien upon its property could be enforced therein; and that, if necessary, the First Mortgage of the Western Pacific Company could be foreclosed as a mortgage upon all the property of the Denver Company.

In his order enjoining the Trust Company from proceeding against the Denver Company with its suit in New York, the judge, of his own motion, directed that the Denver Company and the Missouri Pacific Railway Company, which was collaterally interested in Contract B., should be made parties to said suit then pending in his court and should be compelled to interplead therein.

7. At the time of the making of the decision by the judge requiring the Denver Company and the Missouri Pacific Company to be made parties to the cause, one of the counsel for the Reorganization Committee suggested to him that the effect of the order might be to jeopardize the success of the Plan for Reorganization and requested that the entry of an order pursuant to such decision might be delayed until a hearing could be had and a showing could be made to him of the interest of the bondholders as a whole to have such Plan carried out and of the effect of the order upon

the success of the Plan. The judge, however, peremptorily refused to delay the entry of the order and directed that it should be entered forthwith and that counsel for the receivers should cause it to be enforced.

8. Prior to the 16th day of March, 1916, the Trust Company filed in this Circuit Court of Appeals its application for a writ of prohibition to be directed to said judge and prohibiting him from enforcing his order directing the Missouri Pacific Company and the Denver Company to be made parties to said cause; it perfected its appeal to this Circuit Court of Appeals from the order restraining it from proceeding against the Denver Company without consent of said judge; and it filed in this Circuit Court of Appeals its application for a writ of mandamus to be directed to said judge and directing him to cause to be entered in said suit a decree of foreclosure and sale as stipulated by all parties in interest in the suit and applied for by the Trust Company.

All these proceedings were heard together by this Circuit Court of Appeals on the 16th and 17th days of March, 1916.

9. Prior to the 16th day of March, 1916, the Savings Union Bank and Trust Company, a corporation of which the president is John S. Drum, Esq., the younger brother of Frank G. Drum, one of the receivers appointed by said judge and one of the especially trusted representatives and confidential advisers

of said judge, made application in the cause then pending before said judge for leave to intervene in said cause as the holder of certain First Mortgage bonds of said Western Pacific Company and as a non-participator in the Plan and Agreement for Reorganization hereinafter mentioned. In its petition for leave so to intervene and in its complaint in intervention submitted therewith, said Savings Union Company alleged in substance that the Reorganization Committee of holders of such First Mortgage bonds is controlled by certain firms of bankers in the City of New York; that the Trust Company is controlled by such Reorganization Committee; that said firms of bankers had caused the Denver Company to default in the performance of its obligations to said bondholders; had caused said foreclosure suit to be instituted; had caused said New York suit to be commenced; and had taken all said proceedings for the purpose of enabling the Denver Company to escape the performance of its said obligations; that said firms of bankers were interested directly or indirectly in certain bonds of said Denver Company and entertained the purpose of protecting such bonds as against the interests of holders of bonds of said Western Pacific Company represented by such Reorganization Committee and by such Trust Company; that such Reorganization Committee and the Trust Company are betraying the interests of their respective beneficiaries.

10. Upon the hearing in said applications for writs of prohibition and mandamus on the 16th day of March before this United States Circuit Court of Appeals, counsel for said Savings Union Company were permitted to participate in the argument in opposition to the granting of such applications; and counsel for said judge co-operated with said counsel for the Savings Union Company, and argued that said judge should not be compelled to enter a decree of foreclosure and sale in said cause because of the fact that such application of the Savings Union Company for leave to intervene and file its complaint in intervention had been made; and implied clearly in such argument that said application ought to be and would be granted by said judge, and so granted because the Trust Company had shown unfairness in the administration of its trust and did not and could not properly represent the minority bondholders in the prosecution of said cause.

11. Upon such hearing of said applications and the hearing upon such appeal, said judge authorized John S. Partridge, Esq., and Garret W. McEnerney, Esq., to represent him in opposition thereto, although neither of said applications was opposed by any of the parties to said cause. Upon such hearing, said counsel moved to dismiss said appeal upon the ground that the receivers had not been made parties thereto and upon the further ground that the court had not jurisdiction to review such injunctional order because, as contended

by said judge, such order constituted discipline for contempt and was not an injunction in the proper sense of that term; and demurred to said application for a writ of prohibition and to said application for a writ of mandamus upon the ground that this Circuit Court of Appeals had not jurisdiction to entertain the same.

In general, the facts and the reasons for the belief that bias or prejudice exists, as disclosed by the affidavit, are such as, without explanation, might reasonably induce a belief, and manifestly have induced a belief, that the judge is opposed to the Plan of Reorganization; that he distrusts The Equitable Trust Company of New York; that he believes that the Trust Company is not performing its duty as trustee for the equal benefit of all bondholders; that he is unwilling to permit the Trust Company to exercise its own discretion in matters involved in the carrying out of its trust; that he desires to interpose and exercise his own discretion in such matters in place of the discretion of the Trust Company; that in determining what that discretion shall be he relies wholly upon the receivers and counsel for the receivers, who have shown sympathy with those who charge fraud against the Trust Company; that, although it is essential to the affording to the Trust Company, as trustee, of the relief to which it is entitled in the cause, that such relief shall be afforded with all proper speed, all practises and contentions of the receivers and their counsel and all orders and directions of the court have been such as

have involved and must necessarily involve delay; that the judge conceives that it is his duty to protect bondholders who are not before the court, which conception is evidently based upon his belief that the Trust Company is not itself protecting all bondholders equally.

IV.

AS TO WHETHER THE AFFIDAVIT SHOWS GOOD CAUSE FOR NOT FILING IT WITHIN THE TIME LIMITED BY SECTION 21 OF THE JUDICIAL CODE.

Some of the facts and reasons stated in the affidavit and asserted as justification for the belief that the judge has a personal bias and prejudice, which, in such affidavit, he is stated to have, took place before the 6th day of March, 1916, upon which day the present term of the District Court of the United States for the Northern District of California opened. Many of the principal facts, however, came into existence after the opening of that term. Facts which occurred before the opening of the term are set forth in the affidavit because they give color to, and, in turn, derive color from, facts which occurred after the opening of the term. Indeed, it was not until the declaration by the judge on the 6th day of March, 1916, that he depended upon the receivers and their counsel for information and guidance with reference to the rights of those whose interests have been committed to the

keeping of the court and that the bondholders who had not subscribed to the reorganization scheme were before the court and that the court was bound to protect their rights equally with those of any body of bondholders who may desire a different course to be pursued, followed by the plainest and most strenuous endeavors on the part of the judge, through his counsel, to evade jurisdiction of the Circuit Court of Appeals upon the review of proceedings of the judge, which, if not reviewed and reversed, would necessarily destroy the Plan of Reorganization adopted by a large majority of the bondholders, that the full significance of facts occurring before the opening of the present term of court was demonstrated.

Unless it shall be the policy of the law to require that affidavits of the character of that in question must be filed forthwith after the first intimation of any character that bias or prejudice exists, in order that they may be held to have been filed in time, this affidavit cannot reasonably be held to have been made any later than the earliest time at which the affiant was justified in making it.

The affidavit discloses that it was not until after the complaint in intervention of the Savings Union Bank and Trust Company, containing charges of fraud and bad faith, had been filed and that such charges had been put forward in argument before the United States Circuit Court of Appeals on the 16th and 17th days of March, 1916, and had been acquiesced in and ap-

parently approved by counsel for the judge, who were collaborating with counsel for the Savings Union Company, as justifying the action taken by the judge before any charges had been made, that any director, officer or agent of or counsel for the Trust Company became fully convinced that the judge had a personal bias and prejudice against the Trust Company which would cause him to persist in denying to it the relief to which it is entitled in the cause. The affidavit shows that forthwith upon receiving information that the Savings Union Company had applied for leave to intervene in the cause, and information of the character of its complaint, and that the apparent purpose of the intervention and of said judge was to postpone indefinitely the entry in the cause of a decree of foreclosure and sale, the vice-president of the Trust Company, who made the affidavit, came directly to San Francisco from New York, arriving on the 18th day of March, 1916, and proceeded to make investigation and to examine the various papers and records in the cause in order that he might become familiar with the facts in the matter. It states that the vice-president of the Trust Company reached a conviction that personal bias and prejudice against the Trust Company existed in the mind of the judge; and that he returned to New York, reported the facts to the Executive Committee of the Trust Company, and was requested and directed to make the affidavit and cause it to be filed in the cause.

It is submitted that the action of the Trustee and its officers has been dignified, deliberate and conscientious; that any greater haste in the matter would have been improper; that the affidavit was filed at the earliest date upon which reasonably and practically it could have been filed.

It is true that, under the facts, as stated in the affidavit itself, it might well be claimed that the affidavit could have been filed a few days earlier, but it is stated that, in view of the proceedings pending before the Circuit Court of Appeals seeking summary remedies against the judge, it was not considered proper from the viewpoint of ethics to file an affidavit of this character until a decision should have been made in those proceedings.

V.

AS TO WHETHER MANDAMUS WILL LIE.

The writ of mandamus may be used by appellate courts to compel such proceedings as may be necessary in order that the appellate court may exercise the jurisdiction to review given to it by law. *Kendall* vs. *U. S.*, 12 Peters, at page 622.

In *Barber Asphalt Paving Co.* vs. *Morris*, 132 Fed., 945, it is said:

> "It is obvious that the primary reason for the grant to the federal appellate courts of the dominant power to issue their writs of mandamus to the inferior courts in the exercise of and in aid of their appellate jurisdiction was to enable them

> to protect that jurisdiction against possible evasions of it. . . . The moment such a suit" (a suit which is reviewable in the appellate court) "is commenced, the appellate jurisdiction over it exists, the power and the right to ultimately review the proceedings in it are vested in one of the appellate courts. But in the great majority of cases it is only by an appeal or by a writ of error which challenges the final decision in the case that any of the proceedings in it may be reviewed. The opportunities for subordinate courts to evade the jurisdiction of the appellate courts, to prevent the exercise of this jurisdiction, and to destroy or make ineffectual the right of the unsuccessful party to review their rulings by failures to settle bills of exceptions, by unreasonable delays, by stays of proceedings, and by direct and indirect refusals to proceed to final judgments and to their enforcement are far more numerous before the writs of error or the appeals can be taken than they can be thereafter. Few, indeed, are the cases in which appellate jurisdiction is disregarded after the right to it has been actually exercised. But many cases arise in which the acts or orders of the inferior courts, unless corrected by the writ of mandamus, prevent the exercise of appellate jurisdiction and destroy its effect before any final decision which may be challenged by appeal or writ of error has been reached."

And this Court in *In re Dennett,* 215 Fed., 673, considered fully the ground of jurisdiction of the court in mandamus proceedings, and rendered an opinion which is in entire harmony with our contention.

The jurisdiction in this case is clear. The writ is not sought to serve in lieu of a writ of error or

appeal. There is here no question of a matter fully within the power of the judge to decide and which he has wrongly decided. The petition does not present a decision of the judge to the effect that he has jurisdiction, made in a case in which he has power to make such a decision, one way or the other. It presents merely a refusal of the judge to perform a duty imposed upon him by law—a duty purely ministerial. It does not seek to control, or change the manner of the use of, the discretion of the judge. It merely seeks to compel him to perform an act as to the performance or non-performance of which, or as to the manner of performance of which, he has no discretion.

The Trust Company has an absolute right to proceed with its suit. It cannot proceed with it without a judge; and the suit is without a judge.

This Court has a right of review of the suit. It cannot exercise it until there is something to review. There cannot be anything to review unless the suit proceeds; and it cannot proceed until a judge has been designated to proceed with it.

It is idle to suggest that Judge Van Fleet is ready to try the suit and that therefore progress in it need not be stayed. The statute has deprived him of power to proceed; and it is at least questionable whether such power can be conferred upon him by consent of all parties.

If the suit should proceed to decree before Judge

Van Fleet, it is quite true that a review might be had and a determination that the decree was void might be obtained. But that would not be effective relief for the Trust Company. Ultimate relief obtained at the expense of the continuance of an expensive receivership for years is not the relief to which it is entitled.

It was said in *In re Dennett* by this Court that, although it is true that mandamus will not lie where there exists an adequate legal remedy, the legal remedy must be as specific, prompt, and competent to afford relief upon the very subject in controversy as mandamus.

And in *In re Winn,* 213 U. S., at page 466, the Court said:

> "Mandamus, it is true, never lies where the party praying for it has another adequate remedy. The writ of mandamus was introduced to supplement the existing jurisdiction of the courts and to afford relief in extraordinary cases where the law presents no adequate remedy. *High on Extraordinary Legal Remedies,* 3d ed., §15. But where, without any right, a court of the United States has wrested from a state court the control of a suit pending in it, an appeal or writ of error, at the end of long proceedings, which must go for naught, is not an adequate remedy."

The same reasoning is apposite where a judge seeks to wrest, from such judge as may lawfully be desig-

nated to try the suit, the control of a suit pending in his court.

We submit that the writ should be issued as prayed.

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